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2
3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**

5 * * *

6 Skyler James Fowler,

7 Plaintiff,

8 v.

9 Steve Sisolak, et al.,

10 Defendants.

Case No. 2:19-cv-01418-APG-DJA

11 **Order**

12 This matter is before the Court on the below motions:

13 ECF No. 167 Plaintiff's renewed motion for an order to produce
14 and serve Plaintiff's entire medical file.

15 ECF No. 172 Plaintiff's motion to compel discovery

16 ECF No. 175 Plaintiff's motion to extend discovery deadlines

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18 ECF No. 183 Plaintiff's motion to extend time to file a reply in
19 support of ECF No. 167

20 ECF No. 194 Plaintiff's second motion to extend time to file a
21 reply in support of ECF No. 167

22 ECF No. 202 Plaintiff's motion to deem his reply in support of
23 ECF No. 172 timely

24 ECF No. 204 Plaintiff's motion to replace the exhibits to ECF No.
201

25 ECF No. 209 Plaintiff's third motion to extend time to file a reply
26 in support of ECF No. 167

27 ECF No. 211 Plaintiff's motion for issuance of summons to A.
28 Cooper

1 ECF No. 212 Plaintiff's motion to extend time for serving the
remaining defendants

2 ECF No. 215 Plaintiff's motion to extend time to file a motion for
3 leave to file a fourth amended complaint

4 ECF No. 219 Plaintiff's motion to extend deadlines set by the
5 scheduling order

6 ECF No. 230 Plaintiff's motion to extend time to file a reply in
7 support of ECF No. 213

8 ECF No. 233 Plaintiff's motion for leave to file documents via
U.S. Postal Service or for an extension of time

9 The Court finds these matters properly resolved without a hearing. LR 78-1.

10 **I. Background.**

11 **A. *Plaintiff's motion to produce his medical file.***

12 This is Plaintiff's second request for his entire medical file. (ECF No. 167). The Court
13 initially denied Plaintiff's request for a copy of his medical records as being premature and
14 unsupported by proper points and authorities. (ECF No. 136 at 2). In that order, the Court
15 admonished Plaintiff to "utilize the appropriate discovery devices and comply with the Federal
16 Rules of Civil Procedure to obtain any discovery documents he requests." *Id.*

17 Plaintiff objected to that order. (ECF No. 151). Defendants responded to Plaintiff's
18 objections. (ECF No. 160). The Court has yet to rule on Plaintiff's objection.

19 **B. *Plaintiff's motion to compel.***

20 Plaintiff moves to compel Defendants' responses to discovery requests and for certain
21 items to be deemed admitted.¹ (ECF No. 172). In it, Plaintiff addresses five sets of discovery
22 requests:

- 23 • Plaintiff's first set of requests for admission, which he served
24 on March 2, 2021 and to which Defendants responded on
April 2, 2021.

26
27 ¹ Plaintiff also argues that the instant motion supersedes his previous motion to compel. (ECF
28 No. 164). But Plaintiff withdrew that motion voluntarily on June 22, 2021. (ECF No. 168). The
Court will thus not address this argument.

- 1 • Plaintiff's first set of requests for production, which he
2 served on March 22, 2021 which became due on April 21,
3 2021.
- 4 • Plaintiff's second set of requests for production, which he
5 served on March 23, 2021 which became due on April 22,
6 2021.
- 7 • Plaintiff's third set of requests for production, which he
8 served on April 28, 2021 which became due on May 28,
9 2021.
- 10 • Plaintiff's fourth set of requests for production, which he
11 served on May 17, 2021 which became due on June 16,
12 2021.

13 Plaintiff explains that, on May 12, 2021, May 18, 2021, and May 27, 2021, he brought
14 these matters to Defendants' counsel's attention during meet and confers and that, on June 9,
15 2021, Defendant's counsel agreed to set another meet and confer. Having heard nothing further,
16 Plaintiff sent Defendant's counsel a letter on June 13, 2021 informing her that he would be filing
17 a motion to compel. Plaintiff explains that, at the time he filed his motion on June 24, 2021,
18 Defendant's responses to his four sets of requests for production were overdue. Plaintiff also
19 argues that, although Defendants asserted that they would supplement their responses to
20 Plaintiff's requests for admissions Nos. 13-15, and 19-20, he has not received any supplemental
21 responses. Plaintiff requests: (1) that these requests for admissions be deemed admitted; (2) that
22 the Court compel Defendants' responses to all of his requests for production other than to request
23 No. 8 in the second set and request No. 14 in the third set; and (3) and that the Court deem all
24 objections waived.

25 In response, Defendants argue that Plaintiff's motion fails because: (1) the parties had
26 already met and conferred regarding the requests for admission; (2) Plaintiff moved to extend the
27 discovery cutoff to address outstanding discovery; and (3) Defendants already responded to
28 Plaintiff's requests for production. (ECF No. 192). First, regarding the requests for admission,
29 Defendants explain that responding to these request for admission Nos. 13-15 and 19-20 require
30 Defendant Jay Barth to review institutional records spanning years. Defendants explain that they
31 told Plaintiff, "in response and via meet and confer, [] that Jay Barth will supplement his

1 responses to RFAs once permitted adequate time to review thousands of pages of institutional
2 records.” Defendants also add in a footnote that the parties have met and conferred many times
3 before and after Plaintiff brought his motion. Second, regarding Plaintiff’s motion to extend the
4 discovery deadlines, Defendants argue that by filing his motion to extend (ECF No. 175), Plaintiff
5 “has acquiesced that the instant motion [to compel] is improper and that he is willing to allow
6 response time.” Third, regarding responding to Plaintiff’s requests for production, Defendants
7 argue that they responded to Plaintiff’s first and second sets of requests on June 29, 2021 and that
8 they will “will immediately respond to Plaintiff’s third set of requests for production.”
9 Defendants assert that Plaintiff failed to inform the Court that Defendants had complied with his
10 requests and withdraw his motion. Defendants add that their counsel has been experiencing an
11 extremely high case load and that Plaintiff has submitted 327 discovery requests, which is why
12 they have had difficulty responding to Plaintiff’s requests on time.

13 Plaintiff replies first, regarding the requests for admission, that he has still not received
14 any supplement, despite being repeatedly promised one during meet and confer efforts both
15 before and after he filed his motion. (ECF No. 201). He also points out that his requests for
16 admission were not directed to Jay Barth, but to the Nevada Department of Corrections.
17 Regardless, the Defendant’s response is the first time, Plaintiff argues, that they brought up
18 needing to review thousands of pages to supplement their responses. Second, regarding his
19 motion to extend time, Plaintiff explains that he “did not state or even imply that he consented to
20 retroactively extending the defendants’ time to respond to the already late request, nor did he
21 waive any objections related to the untimeliness.” Third, regarding Defendants’ argument that
22 they already responded to Plaintiff’s requests for production, Plaintiff explains that Defendants
23 have only responded to two of four of his requests, five days after he filed his motion to compel,
24 and that some of the responses still only state that Defendants will supplement. Plaintiff argues
25 that he was not required to inform the Court that Defendants had responded or to withdraw his
26 motion.

1 ***C. Plaintiff's motions to extend time, to replace exhibits, and to issue summons.***

2 Plaintiff has filed numerous motions to extend time (ECF Nos. 175, 183, 194, 202, 209,
3 211, 212, 215, and 219), a motion to replace exhibits to his reply in support of his motion to
4 compel (ECF No. 204), and a motion to issue summons (ECF No. 211), all of which Defendants
5 have either explicitly unopposed or to which Defendants have not filed a response. Plaintiff has
6 also filed two other motions for extensions to which Defendants are not yet due to respond: (1) a
7 motion to extend time to file a reply in support of his August 27, 2021 motion for appointment of
8 counsel (ECF No. 230); and (2) a motion for leave to file documents via U.S. Postal Service or
9 for an extension of time (ECF No. 233).

10 In his most recent motion for leave to file documents via U.S. Postal Service, Plaintiff
11 asks that the Court allow him to file three items—his reply in support of his motion for
12 appointment of counsel, a declaration in support of that reply, and a motion to extend time to
13 serve defendants—via U.S. Postal Service. (ECF No. 233). Plaintiff explains that these filings
14 were returned to him when he tried to file them through the Lovelock Correctional Center law
15 library and so he attempted again through the mail. In the alternative, Plaintiff asks for an
16 extension of time to file these documents until October 18, 2019. These three items—including
17 the reply for which Plaintiff sought an extension in ECF No. 230—were filed on October 14,
18 2021. (ECF Nos. 234, 235, and 236).

19 **II. Discussion.**

20 ***A. The Court denies Plaintiff's motion for his medical file as premature.***

21 Plaintiff has already filed a request for his medical file (ECF No. 102), which this Court
22 initially denied as premature (ECF No. 136). Plaintiff has also filed both an objection to this
23 Court's order denying his motion for his medical file (ECF No. 151) and a renewed motion for
24 his medical file (ECF No. 167). However, because Plaintiff's objection to this Court's initial
25 order is currently pending in front of the District Judge, this Court denies Plaintiff's renewed
26 motion for his medical file as premature. Plaintiff may choose to re-file his motion after the
27 outcome of the Court's decision on his objection.
28

B. The Court grants Plaintiff's motion to compel in part.

1. The Court grant's Plaintiff's motion to compel responses to his first set of requests for admissions but denies his request to have these responses deemed admitted.

A party may assert lack of knowledge or information as a reason for failing to admit or deny a request for admission only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny. *See* Fed. R. Civ. P. 36(a)(4). The responding party must give reasons why it cannot admit or deny a request; boilerplate reasons are insufficient. *See Jones v. Zimmer*, No. 2:12-cv-01578-JAD-NJK, 2014 WL 6772916, at *5 (D. Nev. Dec. 2, 2014). When a responding party fails to comply with these requirements, the Court has discretion to order that proper responses be provided or to deem the request admitted. *See id.* (citing *Asea, Inc. v. Southern Pac. Transp. Co.*, 669 F.2d 1242, 1245-47 (9th Cir. 1981)). Nonetheless, a court should generally allow the responding party to amend the request for admission and only impose the "severe" sanction of deeming responses admitted where the responding party intentionally disregarded its obligations under Rule 36(a). *See id.*

Here, the Court grants Plaintiff's motion to compel a supplement to his requests for admission, but not to deem the requests admitted. Defendant NDOC's² responses to Plaintiff's requests for admission Nos. 13-15 and 19-20 all state, "[a]t this time Defendant is unable to respond. Defendant intends to supplement this response at a later time following review of institutional records." (ECF No. 172 at 49-50). And indeed, requests for admission Nos. 13-15 and 19-20 require review of institutional records, asking for NDOC to analyze years of data. These responses are thus not boilerplate and are reasonable. Moreover, contrary to Plaintiff's contention, Defendants' response is not the first time they have raised needing to review institutional records.

² Defendant appears to have conflated Jay Barth's responses with NDOC's. Because Plaintiff has moved to compel NDOC's responses, the Court addresses these requests.

1 Nonetheless, since responding on April 2, 2021 Defendants have now failed to
 2 supplement their responses for 195 days. This delay is particularly problematic because the
 3 Federal Rules contemplate a party completing a “reasonable inquiry” before responding to a
 4 request for admission, rather than completing that inquiry after. But the Court does not find this
 5 delay or technical noncompliance with the rules sufficient to impose the severe sanction of
 6 deeming these requests admitted. Defendants have demonstrated that they have not intentionally
 7 disregarded their obligations, but that their counsel has been overworked. And Defendants have
 8 not failed to respond entirely, only to supplement. The Court thus grants Plaintiff’s motion to
 9 compel a supplemental response to his requests for admissions Nos. 13-15 and 19-20 but denies
 10 his request to have these requests deemed admitted.

11 2. The Court grants Plaintiff’s motion to compel Defendants’ responses to his
 12 requests for production and Plaintiff’s request that their objections be
 13 waived.

14 Responses to requests for production are due thirty days after being served. *See* Fed. R.
 15 Civ. P. 33(b)(2)(A). The “failure to object to discovery requests within the time required
 16 constitutes a waiver of any objection.” *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d
 17 1468, 1473 (9th Cir. 1992). If a court grants a motion to compel—or if the disclosure or
 18 requested discovery is provided after the motion was filed—the court must, after giving an
 19 opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the
 20 party or attorney advising the conduct, or both to pay the movant’s reasonable expenses incurred
 21 in making the motion, including attorneys’ fees.” Fed. R. Civ. P. 37(a)(5)(A). The court must
 22 not order payment if the movant filed the motion before attempting in good faith to obtain the
 23 disclosure without court action, the opposing party’s nondisclosure was substantially justified, or
 24 other circumstances make an award of expenses unjust. *Id.*

25 Here, the Court grants Plaintiff’s motion to compel. Defendants’ responses to Plaintiff’s
 26 first, second, third, and fourth requests for production are overdue by 69, 68, 139, and 120 days,
 27 respectively. Defendants served their responses to Plaintiff’s first and second requests for
 28 production on June 29, 2021, five days after Plaintiff filed his motion to compel. Their responses

1 to Plaintiff's second and fourth requests are still outstanding. Plaintiff explains that he reminded
2 Defendants of the outstanding discovery on numerous occasions during conferences, meet and
3 confers, and lastly in a letter, but to no avail.

4 Defendants' arguments in response to Plaintiff's motion to compel are unpersuasive. For
5 example, Defendants' argument that Plaintiff has "acquiesced that [his motion to compel] is
6 improper" by separately moving to extend discovery deadlines is untenable. Moving to extend
7 one deadline, does not by default extend the other. Additionally, Plaintiff was under no
8 obligation to separately inform the Court that he had received Defendants' responses to his
9 discovery requests. Even if he were, he did so in his reply. And Plaintiff was under no obligation
10 to voluntarily withdraw his motion to compel once Defendants responded to his discovery
11 requests. This is particularly true because Defendants responded late and did not respond to all of
12 Plaintiff's discovery requests.

13 The Court does, however, recognize the incredible burden of cases placed on Defendants'
14 counsel and the difficulties she and her office have faced. The Court also recognizes that these
15 burdens have not been helped by the addition of Plaintiff's 327 discovery requests. To be clear,
16 the Court will not look favorably on further, extensive discovery requests. But Defendants'
17 difficulties alone do not show that the delay in responding to Plaintiff's requests has been
18 substantially justified. Defendants have provided no evidence that they have requested extensions
19 or that Plaintiff has been unreasonable in denying any. To the contrary, Plaintiff has asserted that
20 he has tried to resolve the outstanding discovery without Court intervention. The Court thus
21 grants Plaintiff's motion to compel and to deem Defendants' untimely objections waived.
22 Because the Court has granted Plaintiff's motion to compel, it must also order that Defendants
23 pay Plaintiff's costs incurred in bringing the motion.

24 ***C. The Court grants Plaintiff's requests for extension, to replace exhibits, and for***
25 ***summons.***

26 The failure of an opposing party to file points and authorities in response to any motion
27 constitutes a consent to granting of the motion. LR 7-2(d). Under Federal Rule of Civil
28 Procedure 4(c)(3), the Court must order service by a United States Marshal if the plaintiff is

1 authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915. Finally, the Court has broad
 2 discretion in controlling its docket and setting deadlines. *See FTC v. Gill*, 265 F.3d 944, 954-55,
 3 957 (9th Cir. 2001).

4 Here, the Court grants each of Plaintiff's motions to extend—some *nunc pro tunc* because the
 5 deadlines have already passed—that have gone unopposed. (ECF Nos. 175, 183, 194, 202, 209,
 6 212, 215, and 219). Plaintiff's motion to replace the erroneously scanned exhibits to his reply in
 7 support of his motion to compel is also unopposed, and the Court thus grants it. (ECF No. 204).
 8 The Court broadly construes Plaintiff's motion to issue summons—also unopposed—as an
 9 attempt to comply with this Court's orders and a request to re-attempt service on Ahjalee Cooper
 10 and grants that motion. (ECF No. 211). The Court denies Plaintiff's motion to file three items
 11 via U.S. Postal Service as moot because these items are now filed on the docket. (ECF No. 233).
 12 Finally, the Court grants Plaintiff's motion to extend time to file a reply in support of his motion
 13 to appoint counsel *nunc pro tunc* because Plaintiff has since filed his reply. (ECF No. 230).

14 **IT IS THEREFORE ORDERED** that Plaintiff's motion for his medical file (ECF No.
 15 167) is **denied as premature**.

16 **IT IS FURTHER ORDERED** that Plaintiff's motion to compel (ECF No. 172) is
 17 **granted in part**.

- 18 • Defendants shall supplement their responses to Plaintiff's requests for admissions
 19 Nos. 13-15 and 19-20 within thirty days, by **Thursday, November 18, 2021**. The
 20 Court declines Plaintiff's request to deem these requests admitted.
- 21 • Defendants shall respond to Plaintiff's third and fourth set of requests for
 22 production within thirty days, by **Thursday, November 18, 2021**. Defendants'
 23 objections to Plaintiff's first, second, third, and fourth set of requests for
 24 production are waived.
- 25 • Plaintiff shall file an explanation and calculation of the costs he has expended in
 26 filing this motion with the Court within thirty days, by **Thursday, November 18,**
 27 **2021**.

1 **IT IS FURTHER ORDERED** that Plaintiff's motion to issue summons (ECF No. 211) is
2 **granted**. The Clerk of Court is kindly directed to issue summons to Ahjalee Cooper and deliver
3 the same, along with a copy of the third amended complaint, screening order (ECF Nos. 62 and
4 74), and this order to the U.S. Marshal for service. The U.S. Marshal is kindly directed to attempt
5 service one more time on Ahjalee Cooper using the address filed under seal at ECF No. 106.
6 Pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, service must be accomplished
7 within 90 days from the date this order is entered.

8 **IT IS FURTHER ORDERED** that Plaintiff's motion to replace exhibits (ECF No. 204)
9 is **granted**. The Clerk of Court is kindly directed to replace the exhibits attached to ECF No. 201
10 with the exhibits attached to ECF No. 204.

11 **IT IS FURTHER ORDERED** that Plaintiff's motion for leave to file via U.S. Postal
12 Service (ECF No. 233) is **denied as moot**.

13 **IT IS FURTHER ORDERED** that Plaintiff's motions to extend time (ECF Nos. 175,
14 183, 194, 202, 209, 212, 215, 219, and 230) are **granted**.

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16 DATED: October 19, 2021

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19 DANIEL J. ALBREGTS
20 UNITED STATES MAGISTRATE JUDGE
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